IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 24, 2009

RYAN HUNTZINGER V. APRIL PARHAM

Direct Appeal from the Juvenile Court for Maury County
No. 1725-JC George L. Lovell, Judge

No. M2009-00045-COA-R3-CV - Filed January 19, 2010

This is a child custody case. Appellant Mother appeals the trial court's grant of primary residential custody to Appellee Father. The parties were never married and custody of the minor child was initially with the mother pursuant to Tenn. Code Ann. § 36-2-303. Father later petitioned the court to establish paternity and to enter a permanent parenting plan, designating Father as the primary residential parent. Because there was no prior custody determination, the trial court correctly applied the comparative fitness and best interest analysis in reaching its decision. Tenn. Code Ann. §§ 36-6-101(a)(1), 36-6-101(a)(2), 36-6-106. Mother appeals. Finding that the evidence does not preponderate against the trial court's decision, we affirm.[1]

Tenn. R. App. P. 3. Appeal as of Right; Judgment of the Juvenile Court Affirmed

J. STEVEN STAFFORD, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., J., and ANDY D. BENNETT, J., joined.

Lawrence D. Sands, Columbia, Tennessee, for the appellant, April Parham.

Stacy S. Neisler, Spring Hill, Tennessee, for the appellee, Ryan Huntzinger.

OPINION

Appellant April Parham and Appellee Ryan Neal Huntzinger are the parents of the minor child at issue. The parties were never married. On November 22, 2004, Mr. Huntzinger filed a petition for legitimation and to establish a permanent parenting plan in the

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[1] This appeal was originally filed on-briefs with the Middle Section of the Court of Appeals. On December 16, 2009 this case was assigned to Judge Stafford, from the Western Section Court of Appeals.

Juvenile Court for Maury County, Tennessee. In response to Mr. Huntzinger's petition, Ms. Parham petitioned the Maury County General Sessions Court for an order of protection, alleging that Mr. Huntzinger had physically abused her. On November 22, 2004, the General Sessions court entered an *ex parte* order of protection. On December 8, 2004, the order of protection was transferred to the juvenile court where Mr. Huntzinger's petition was pending. On December 20, 2004, Ms. Parham filed her answer and counter-petition, wherein she confirmed that Mr. Huntzinger is the child's biological father.

On March 2, 2005, Ms. Parham petitioned the juvenile court to set child support. In a "Case Status Order," entered on March 14, 2005, the juvenile court indicated that the "12/8/04" order of protection from the general sessions court would remain in effect.[2] On March 15, 2005, the general sessions court entered a protective custody order, indicating that the order will remain in effect from December 20, 2004 through December 20, 2005. The second page of this order indicates that "[t]he petitioner is awarded custody of the parties' minor child," with the notation "juvenile court to decide." This order further indicates that the juvenile court will decide child support. Finally, the general sessions judge indicates that the order is *nunc pro tunc* to December 8, 2004.

The record indicates that, after Mr. Huntzinger filed his initial petition on November 22, 2004, he and Ms. Parham began an on-again-off-again relationship. Mr. Huntzinger testified that, because he and Ms. Parham briefly reconciled, he did not pursue the first petition in the trial court. Mr. Huntzinger testified that, upon learning of the possible dangerous conditions at Ms. Parham's home, on May 2, 2008, he filed a second petition to establish a parenting plan in the juvenile court. By his petition, Mr. Huntzinger sought custody of the minor child, and entry of a permanent parenting plan. As grounds, Mr. Huntzinger specifically averred that:

> 11. Mother fails to provide a stable home environment for the child.
> 12. Mother has allowed multiple men to live with Mother and the child.
> 13. Mother has allowed multiple females to live with Mother and the child who have had numerous male visitors coming in and out of the home in the presence of the child.
> 14. Mother leaves the child unattended to spend time in her

[2]We note that the record does not contain a December 8, 2004 order of protection from the general sessions court. As set out above, the only order of protection we find in the record is the *ex parte* order, which was entered on November 22, 2004 along with a judgment sheet, dated December 8, 2004, indicating that the *ex parte* order will be transferred to the juvenile court.

bedroom with male visitors.
15. Mother has exposed the child to numerous verbal altercations between Mother and male visitors of Mother.
16. Mother allows her male friends to physically discipline the child.
17. Mother exposes the child to excessive use of alcohol.
18. Mother has allowed the child to drink alcohol.
19. Mother allows, and participates in, criminal activity at her residence in the presence of the child.
20. In the last two (2) years, the police have been called to or from Mother's residence in excess of seven (7) times as a result of the activities occurring at Mother's residence that include, but are not limited to, breaking and entering, harassment, attempted suicide, theft, and disturbance.

In addition, Mr. Huntzinger averred that Ms. Parham's brother, a convicted sex offender, was allowed to sleep in the child's bed, that Ms. Parham smoked around the child, despite the fact that the child suffers from asthma, and that Ms. Parham often left the child with neighbors due to her unwillingness to care for him. In her response, filed on June 30, 2008, Ms. Parham denies the material allegations set out in Mr. Huntzinger's petition, and asks the court to dismiss the petition.

The petitions were heard on June 20, 2008 and July 22, 2008. At trial, Mr. Huntzinger testified that prior to filing his second petition, he entered rehabilitation for drug abuse and has successfully maintained his sobriety. Mr. Huntzinger testified that he has also married. Both Mr. Huntzinger and his wife testified as to the condition of their home, their ability to provide for and parent all of their children,[3] and their willingness to foster the child's relationship with Ms. Parham. A former friend and neighbor of Ms. Parham's also testified, telling the court that she had witnessed Ms. Parham drink to the point of intoxication and blackout, and had witnessed the child consume alcohol. Proof was also entered as to the condition of Ms. Parham's home and the hygiene of the child.

By Order of December 23, 2008, the trial court held that "[i]t is in the child's best interest for custody to be granted to Father pursuant to Tennessee Code Annotated §36-6-106, *et* [*seq*.]." Specifically, the trial court found that since the child's birth, "both parents have made substantial positive changes in their lives;" that Mr. Hutzinger is able to provide a "good family environment;" and that he is more amendable to fostering a relationship with

[3]Mr. Huntzinger and his wife have one child together and his wife has three children from a previous marriage.

both parents than Ms. Parham, as is consistent with the best interest analysis in Tenn. Code. Ann. § 36-6-106(a)(10).

Concurrent with the December 23, 2008 Order, the trial court entered a permanent parenting plan, granting Mr. Huntzinger primary residential custody, giving Ms. Parham visitation, and ordering Ms. Parham to pay child support. Ms. Parham filed her notice of appeal on January 2, 2009. Thereafter, on February 18, 2009, Mr. Huntzinger petitioned the trial court to set child support. By Order of April 7, 2009, this Court ordered Ms. Parham to obtain a final order in the trial court. On April 21, 2009, the trial court entered an order setting Ms. Parham's child support obligation at $170.00 per month, with an additional $30.00 per month toward her arrearage. With the entry of this order, the case now appears to be in the proper posture for our review under Tenn. R. App. P. 3(a); ***State ex rel. McAllister v. Goode***, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997). Ms. Parham raises two issues for review as stated in her brief:

> I. Whether the trial court erred in modifying custody without any findings [that] a material change in circumstances occurred.
> II. Whether the trial court erred in failing to consider the relevant factors set forth in Tenn. Code Ann. §36-6-106(a) in finding that it was in the best interest of the minor child to modify custody.

Because this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. ***See*** Tenn. R. App. P. 13(d). Determinations regarding custody and visitation "often hinge on subtle factors, including the parents' demeanor and credibility during the... proceedings themselves." ***Gaskill v. Gaskill***, 936 S.W.2d 626, 631 (Tenn. Ct. App.1996). Consequently, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses and their manner and demeanor while testifying is in a far better position than this Court to decide those issues. ***See McCaleb v. Saturn Corp***., 910 S.W.2d 412, 415 (Tenn.1995); ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997). The weight, faith, and credit to be given to any witness' testimony lies, in the first instance, with the trier of fact, and the credibility accorded will be given great weight by the appellate court. ***See id.***; ***see also Walton v. Young***, 950 S.W.2d 956, 959 (Tenn.1997). In short, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case, ***Parker v. Parker***, 986 S.W.2d 557, 563 (Tenn. 1999), and appellate courts will only set aside a trial court's decision regarding custody or visitation when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence

found in the record." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 88 (Tenn.2001).

In order to address Ms. Parham's issues, we must first determine whether the standard for establishing custody, or the standard for modifying custody, is applicable to the case at bar. When a court is asked to modify an existing, valid custody arrangement, it is statutorily directed to first make a determination as to whether a material change of circumstances has arisen since the entry of the previous custody order. Tenn. Code Ann. §§ 36-6-101(a)(2)(B) and (a)(2)(C); ***Kendrick v. Shoemake***, 90 S.W.3d 566 569 (Tenn. 2002); ***Blair v. Badenhope***, 77 S.W.3d 137, 150 (Tenn.2002); ***Curtis v. Hill***, 215 S.W.3d 836, 840 (Tenn. Ct. App.2006). In a modification case, it is only after the trial court has found by a preponderance of the evidence that a material change in circumstances has occurred that the court may go on to consider the second prong of the analysis–whether modification is in the best interest of the child. ***Cranston v. Combs***, 106 S.W.3d 641, 644 (Tenn.2003); ***Burchett v.. Burchett***, No. M2008-00790-COA-R3-CV, 2009 WL 161084, at *2-3 (Tenn. Ct. App. Jan. 22 2009). When an initial custody determination is absent, the court is to establish custody based on the doctrine of comparative fitness, determining the best interest of the child based on the factors found in Tenn. Code. Ann. § 36-6-106. ***See*** Tenn. Code Ann. § 36-6-106.

Ms. Parham argues that the Order of Protection, entered by the general sessions court on March 15, 2005, constitutes an initial custody determination such that the standard for modification of custody would apply. The general sessions court clearly stated on the Order of Protection, "juvenile court to decide." From our review of the record, it appears that the general sessions court did not have or assume jurisdiction to make a final or permanent custody determination in this case.

Assuming *arguendo*, that the general sessions court did assume jurisdiction, the order entered by the general sessions court granting custody to Ms. Parham, does not amount to an initial custody determination. "Permanent custody decisions, once made, are res judicata with regard to the facts in existence or reasonably contemplated when the decision was made." ***King v. King***, No. 01-A-019110PB00370, 1992 WL 301303, *3 (Tenn. Ct. App. 1992)(citations omitted). Consequently, in order to modify a permanent custody decision, the party seeking the modification must show a material change in circumstances. ***Id.*** This requirement, however, only applies to a permanent custody decision and not a temporary decision. "An interim order is one that adjudicates an issue preliminarily; while a final order fully and completely defines the parties' rights with regard to the issue, leaving nothing else for the trial court to do." ***State, ex rel., McAllister v. Goode***, 968 S.W. 2d 834, 840 (Tenn. Ct. App. 1997)(citing ***Vineyard v. Vineyard***, 170 S.W.2d 917, 920 (Tenn. 1942)).

We are unpersuaded that the Order of Protection rises to the level of a final custody

determination. Specifically, the order of protection did not make findings concerning the comparative fitness of the parties, did not clearly name a custodian of the minor child, did not set visitation or other rights of the non-custodial parent, and did not set child support. In fact, concerning these findings, the order of protection states only that the juvenile court will decide. Accordingly, any custody decision by the general sessions court was merely temporary, and modification of such would not require a showing of changed circumstances.

Ms. Parham further submits that the trial court was required to apply the standard for modification of custody because she had custody pursuant to Tenn. Code Ann. § 36-2-303. It is well settled that, absent an order of custody to the contrary, custody of a child born out of wedlock is with the mother. Tenn. Code Ann. § 36-2-303. In the instant case, the minor child was born out of wedlock and the record does not indicate that there was a judicial determination of custody prior to the order and permanent parenting plan entered on December 23, 2008, granting Mr. Huntzinger custody. In ***In Re: D.A.J.***, No. M2004-02421-COA-R3-JV, 2005 WL 3369189 (Tenn. Ct. App. Dec. 9, 2005), this Court addressed the same question currently before us, whether a finding of material change in circumstances should be required where mother had custody pursuant to Tenn. Code Ann. §36-2-303 and no prior custody order existed. ***In Re: D.A.J.***, 2005 WL 3369189 at *14-15. This Court clearly held, "Father was required only to establish by a preponderance of the evidence that designating him as the primary residential parent after applying the comparative fitness test was in the child's best interest." ***Id;*** *see also* ***Durant v. Howard***, No. E2000-02072-COA-R3-CV, 2001 WL 1103500 (Tenn. Ct. App. Sept. 20, 2001) (no Tenn. R. App. P. 11 application filed)(holding changed circumstance standard cannot be invoked absent a prior judicial determination).

Based upon the foregoing, the trial court was not required to find a material change in circumstances because there was no prior judicial determination of custody to modify. Accordingly, the trial court did not err by making a custody determination absent a finding of a material change in circumstances. The question then becomes whether the trial court correctly applied the applicable standard for establishing custody. That standard requires courts to apply the doctrine of comparative fitness to determine the custody arrangement that is in the best interest of the child. ***Burden v. Burden***, 250 S.W.3d 899, 908-09 (Tenn. Ct. App.2008). In making this determination, the court is to use the factors outlined at Tenn. Code Ann. § 36-6-106.

While Tenn. Code Ann. § 36-6-106(a) requires a trial court to consider all of the applicable statutory factors in reaching its decision on custody, a trial court is neither required to list each factor in its decision, nor to explain the effect of the statutory factors on the court's overall determination. ***Dillard v. Dillard***, No. M2007-00215-COA-R3-CV, 2008 WL 2229523 (Tenn. Ct. App. May 29, 2008); ***Woods v. Woods***, No.

M2006-01000-COA-R3-CV, 2007 WL 2198110, *2 (Tenn. Ct. App. July 26, 2007) (no Tenn. R. App. P. 11 application filed); ***In re D.A.J.***, 2005 WL 3369189 at *6. When the trial court fails to make specific factual findings, however, a reviewing court must make its own determination as to where the preponderance of the evidence lies since there are no findings to which the presumption of correctness can attach. ***Dillard***, 2008 WL 2229523, at *5; ***Curtis v. Hill***, 215 S.W.3d 836, 839 (Tenn. Ct. App.2006).

In the instant case, the trial court did not meticulously outline each of the statutory factors in reaching its decision to grant custody of the child to Mr. Huntzinger. However, the court was not required to do so. The court specifically found that Mr. Huntzinger is able to provide a "good family environment for the child," and that Mr. Huntzinger is more amenable than Ms. Parham to fostering a healthy and loving relationship between both parents and the minor child. ***See*** Tenn. Code Ann. § 36-6-106(a)(10). We have reviewed the record in this case, and conclude that the evidence does not preponderate against the trial court's findings. Moreover, the evidence adduced at the hearings also weighs in favor of Mr. Huntzinger concerning many of the other factors set out at Tenn. Code Ann. § 36-6-106.

From the record, it appears that Mr. Huntzinger has taken difficult steps to achieve and maintain his sobriety. It also appears that he has matured and settled since the child's birth. He has married a supportive partner, and has maintained steady employment. Moreover, it is clear from his testimony that he has prioritized his role as a parent, and that he is, in fact, eager to expand that role. Perhaps most impressive to this Court is Mr. Huntzinger's testimony (and the concurring testimony of his wife) that it is their wish to have some relationship with Ms. Parham for the benefit of the child. Although Ms. Parham testified that she also wants to have a good relationship with the Huntzingers, her answers on cross examination seem to negate her earlier statements. Ms. Parham admits that she denied Mr. Huntzinger additional visitation time with the child over the Christmas break, opting instead to leave the child with a babysitter rather than with his father. Moreover, Ms. Parham's testimony indicates that she has occasionally withheld the child's location from the father. We do not underestimate the fact that Ms. Parham undoubtedly bore more of the parenting responsibilities while Mr. Huntzinger was in rehabilitation. And, while it is very clear that Ms. Parham loves this child, her actions are sometimes inconsistent with that fact. In addition to exhibiting rather passive-aggressive behavior toward Mr. Huntzinger concerning visitation, there is no indication that Ms. Parham has made the lifestyle changes that Mr. Huntzinger has made to effect a stable and healthy environment in which to raise a child. There is sufficient testimony to find that Ms. Parham exhibits poor judgment in allowing numerous people to either live with her, or to frequently visit and stay overnight. By his own testimony, Ms. Parham's brother is convicted of statutory rape, and (at the time of the hearing) was a registered sex offender. Despite his own testimony that he is not to live in a home with small children, the record indicates that Ms. Parham's brother did live with

her, and did sleep in the child's room.

Since the birth of the child at issue in this appeal, Ms. Parham has given birth to another child with a different father. She has become engaged and her fiancé has been murdered. Ms. Parham was the beneficiary of her fiancé's life insurance and received what, we infer, was a rather substantial amount of money. It appears that Ms. Parham has used this money to improve her life. Although Ms. Parham has purchased and furnished a home, this material change does not, *ipso facto*, indicate the type of home she will provide within those walls. After reviewing the entire record in this case, there is still some question in this Court's mind as to whether Ms. Parham has actually effectuated the changes she espouses.

There is evidence in the record indicating that, despite her testimony, Ms. Parham does drink alcohol, and does allow parties at her home where copious amounts of alcohol (and perhaps illegal drugs) are consumed. The record is clear that, at more than one of these parties, physical altercations have occurred–even in the presence of the minor child. These facts do not preponderate against the trial court's finding that Mr. Huntzinger's home is a better choice to ensure stability and continuity in the child's life. Consequently, we find that the trial court did not err in finding that it was in the best interest of the child for Mr. Huntzinger to be granted custody.

We affirm the Order of the trial court. Costs of this appeal are assessed against the Appellant, April Parham, and her surety.

J. STEVEN STAFFORD, J.